No. 1368

Supreme Court of the United States

OCTOBER TERM, 1946

IN THE MATTER

of

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Debtor.

PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD COMPANY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Debtor, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FRED N. OLIVER
WILLARD P. SCOTT
CHARLES A. COOLIDGE
M'CREADY SYKES
WILLIAM P. PALMER
H. C. MCCOLLOM
EDWARD E. WATTS, JR.
JESSE E. WAID
JOHN W. DAVIS
EDWIN S. S. SUNDERLAND
JUDSON C. MCLESTER, JR.
JOHN E. MASTEN
JOHN L. HALL
JAMES GARFIELD
GEORGE E. BEERS
EDMUND RUFFIN BECKWITH

Counsel for Respondents

Dated: May 22, 1947.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF CONTENTS.

Table of Cases Cited.

Other Authorities Cited.

Supreme Court of the United States

OCTOBER TERM, 1946

IN THE MATTER

of

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Debtor.

PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD COMPANY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Debtor, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents Insurance Group, Mutual Savings Bank Group, Bankers Trust Company as Trustee under the First and Refunding Mortgage, United States Trust Company of New York as Trustee under the Harlem River & Port Chester Mortgage, Irving Trust Company as Trustee under the 6% Collateral Trust Indenture dated April 1, 1925, Bank of New York as Trustee under the New England Railroad Company Mortgage, City Bank Farmers Trust

Company as Trustee under the Central New England Railway Company First Mortgage, and Protective Committee for Holders of Boston and New York Air Line First Mortgage 4% Bonds, own or represent the major portion of the secured debt of The New York, New Haven & Hartford Railroad Company, Debtor. Respondents Old Colony Railroad Company Plan Committee and The New York, New Haven & Hartford Railroad Company, Debtor, have joined with them in the courts below in actively supporting the provisions of the Plan of Reorganization for the New Haven involved in the pending petition. Those provisions have heretofore been approved by the Interstate Commerce Commission (hereinafter called the "Commission"), the District Court for the District of Connecticut (hereinafter called the "District Court") and the Circuit Court of Appeals for the Second Circuit (hereinafter called the "Circuit Court of Appeals") as meeting in all respects the requirements of Section 77 of the Bankruptcy Act.

Opinions Below.

The District Court approved the Commission's Plan with certain corrections in December, 1943 (54 F. Supp. 595)[1] and, as so corrected by the Commission, in March,

---

[1] R. 10,695-10,763. For uniformity and convenience, references herein use substantially the same abbreviated designations employed by Petitioners (Petition, footnote pp. 2-3), as follows:

Stipulation volumes—Stip. R.
Prior Supreme Court Record—Prior S. C. R.
C. C. A. Record from Court below—C. C. A. R.
District Court Record, generally—R. (rather than D. R.).

As Petitioners' 64 page petition and their 44 page brief contain scant reference to the lengthy record of testimony before the Commission, no abbreviated designation was used. Such references herein are designated "ICC R.".

1944 (54 F. Supp. 631).[1] In January, 1945, the Circuit Court of Appeals affirmed the District Court's approval in all but two respects (147 F. (2d) 40),[2] one of which, involving the Old Colony Railroad Company (hereinafter called "Old Colony"), required further consideration by the Commission. The limited scope of this reconsideration was also approved by the Circuit Court of Appeals in June, 1945 (150 F. (2d) 169).[3] After reconsideration of the Plan by the Commission without modification, the District Court again approved the Plan and confirmed it in August, 1945 (unreported)[4] and in January, 1947 the Circuit Court of Appeals affirmed that approval and confirmation (unreported).[5]

Jurisdiction.

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. Sec. 47(c)).

A Limited Aspect of the Plan is Involved Here.

The Old Colony is a subsidiary debtor in this proceeding under Section 77(a). Its reorganization as a part of the Plan for the New Haven has been approved by the Commission, the District Court and the Circuit Court of Appeals. After consummation of the Plan, the Old Colony properties, which from 1893 until disaffirmance of the Old Colony lease in June, 1936 were operated by the New Haven

---

[1] R. 11,024-11,049.
[2] R. 11,525-11,545.
[3] Stip. R. I, No. 5, pp. 11,825-11,827.
[4] Stip. R. I, No. 11, pp. 11,891-11,914.
[5] Stip. R. I, No. 15, pp. 12,655; 12,765.

as part of its system, will continue as part of that system[1] and be owned rather than leased by the reorganized New Haven.

In terms of securities to be issued in the reorganization the relative importance of the properties of the New Haven proper and those of the Old Colony is illustrated by the fact that of the $372,697,033 principal amount of the securities of the reorganized New Haven to be issued upon consummation of the Plan, those distributable to creditors of the New Haven proper total $365,000,000 face amount as compared with $7,697,033 in the case of Old Colony, plus cancellation of the New Haven's prior lien claim against Old Colony of approximately $10,500,000.

The pending petition is concerned solely with certain of the provisions of the Plan that provide for the joint reorganization of the New Haven and the Old Colony, which for convenience are reprinted as Appendix A hereto. Not all of them are objected to by Petitioners. Petitioners do not object to the provisions that will relieve the New Haven from all obligation to operate passenger service on Old Colony lines if the operating losses from such service exceed certain specified "critical figures" (Par. N(2) and (3)). They do not object to the limitation placed upon annual payments for the use by the reorganized New

---

[1] The New Haven system consists of three groups of properties —those of the New Haven proper, those of the Boston & Providence Railroad Corporation, and those of the Old Colony. By far the most important of these properties in terms of track mileage, volume of traffic, revenues, net income, bonded and other indebtedness and fixed charges, are those of the New Haven proper, which include all of the system's railroad lines west of Providence, Rhode Island. The properties of the Boston & Providence consist principally of its railroad line between Providence and Boston, which is a major link in the New Haven system's main line from New York to Boston. Those of the Old Colony are chiefly its railroad lines in southeastern Massachusetts, none of which is main line trackage.

Haven of the Boston Terminal (Par. N(1)). In fact, any value the Old Colony may have for reorganization purposes arises in large part from these provisions. Petitioners' complaint is simply that the Old Colony properties are worth more to the reorganized New Haven than the Commission has found, and that after the claims against Old Colony ranking prior to the Old Colony Bonds have been satisfied by the New Haven estate in cash or its equivalent, the holders of those Bonds should receive more new securities than the $4,398,305 fixed interest bonds and $3,298,728 income bonds distributable to them under the Plan (Par. N(4) and (5)).

The Commission in its Sixth Supplemental Report (Stip. R. I, No. 5, pp. 11,825, *et seq.*) held this complaint to be without factual basis. The District Court in its decision of August, 1945 (Stip. R. I, No. 11, pp. 11,891, *et seq.*) and the Circuit Court of Appeals in its decision of January, 1947 (Stip. R. I, No. 15, pp. 12,655, *et seq.*) have since rejected it as without legal foundation. Petitioners now seek a writ of certiorari to give them still another opportunity to attempt to upset the Commission's valuation of the Old Colony's properties.

Despite Petitioners' opposition to this part of the Plan, the Old Colony Plan Committee, which has taken an active part in the reorganization proceedings since the disaffirmance of the Old Colony lease, supports the Plan and has joined in this brief because a separate reorganization would increase the New Haven's prior lien claim discussed below by including operating losses subsequent to December 31, 1943, the "cut-off date" in the Plan, and might result in an equity receivership for Old Colony in which it would not be possible to impose limitations on Old Colony's future losses—all resulting in Old Colony bondholders'

(less than one-fourth of whom in terms of principal amount are represented by Petitioners) receiving far less than the Plan provides.

Statement of the Case.

In the New Haven proceedings, which began nearly 12 years ago, the Commission has held hearings on plans for the New Haven and the Old Colony at six different times. More than 4,300 pages of testimony have been recorded and 297 exhibits received in evidence. Over 1,500 pages of this testimony and over 75 of the exhibits (in addition to those which indirectly relate to the Old Colony) are concerned primarily with the treatment to be accorded Old Colony.

The Old Colony properties.

The Old Colony properties, upon which such long and intensive consideration has centered, consist of its railroad lines in southeastern Massachusetts, none of which is main line trackage; certain terminal facilities in Boston known as the "Market Terminal", "Yards Nos. 4 and 5", and the "Heating Plant"; one-half of the capital stock of Union Freight Railroad, a switching line in Boston; $3,600,000 First and Refunding Bonds of the New Haven; an unsecured claim allowed against the New Haven for damages from the disaffirmance of the Old Colony lease and an alleged but unadjudicated claim against the Trustee of the New Haven First and Refunding Mortgage based upon the disaffirmance of the Old Colony lease. The latter two claims have arisen, and the $3,600,000 First and Refunding Bonds have been acquired, during the reorganization.

Approximately $10,500,000 of claims against the Old Colony properties rank prior to the claims of the Old Colony bondholders.

In June, 1936, the Old Colony lease was disaffirmed upon the ground that the $1,600,000 annual net rental was an onerous burden from which the New Haven estate should be relieved. Later, application of the segregation formula approved by the Commission showed an Old Colony operating deficit of approximately $2,000,000 per year over and above the rental.

Disaffirmance of the Old Colony lease gave immediate relief from the rental payments, but the obligation to advance cash to meet Old Colony operating losses continued, for under (c)(6) of Section 77 the District Court directed the New Haven Trustees in the public interest to operate the Old Colony properties for Old Colony's account. As security for the repayment of the funds so advanced, the New Haven estate has a prior lien upon all the Old Colony properties. *Palmer* v. *Palmer*, 104 F. (2d) 161 (1939), *cert. den.* 308 U. S. 590 (1939). In 1939 the New Haven Trustees became concerned lest the Old Colony properties should prove inadequate security for the repayment of their advances. Upon their petition, the District Court directed them not to advance further funds for the payment of Old Colony taxes and the portion of Boston Terminal taxes and bond interest chargeable to Old Colony, as the payment of those items was not essential to the maintenance of service on the Old Colony lines (R. 6,159-6,169). On appeal that order was upheld by this Court in *Palmer* v. *Webster & Atlas Nat. Bank*, 312 U. S. 156 (1941). However, upon consummation of the Plan the New Haven will be obligated to pay the claims[1]

[1] Claims for Old Colony taxes through December 31, 1943 have been settled and paid by the New Haven.

for those items to the extent allowed and the estimated amounts thereof through December 31, 1943, the "cut-off date", have been included in the New Haven's prior lien claim against Old Colony. As computed by the Commission through December 31, 1943, the prior lien claim, including reorganization expenses, amounted to $10,494,844.

If the total net operating deficit of the Old Colony properties since December 31, 1943 should be taken into account, the New Haven's prior lien claim would be substantially increased with a corresponding reduction in the amount of securities distributable to the Old Colony bondholders. But if the Plan is consummated, the New Haven estate will have borne Old Colony's operating deficits since December 31, 1943 and will have no claim for reimbursement.

Nevertheless, the Old Colony bondholders will receive over $7,650,000 principal amount of bonds of the reorganized New Haven under the Plan.

The Commission has found and determined that the Old Colony properties, when operated as a part of the New Haven system under the Plan's limitations upon Old Colony passenger losses and Boston Terminal charges, have sufficient value, after satisfaction of the New Haven's $10,494,844 prior lien claim, to justify the issuance to Old Colony bondholders of $4,398,305 of new fixed interest bonds and $3,298,728 of new income bonds of the reorganized New Haven (Stip. R. I, No. 1, pp. 10, 914-6; No. 3, p. 11, 701). This is the determination of which Petitioners complain.

The Proceedings Before the Commission and the Courts Relating to Old Colony.

Petitioners' description of the consideration the Commission has given to the Old Colony problems is far from

complete. The Commission's study of those problems falls into two major periods. During the first, the Commission's consideration of Old Colony problems paralleled its development of a plan for the New Haven proper. During the second, the treatment to be accorded the Old Colony has been the major issue in the reorganization. Petitioners, however, dismiss the entire first period (1937-1940) and much of the second period (1940 to date) with seven lines of comment solely about the Commission's Report of March, 1940. In part, this may be due to the fact that by February, 1942, when Petitioners intervened before the Commission, practically all of the significant testimony and evidence (other than current reports of revenues periodically transmitted to the Commission) regarding the Old Colony, its properties, its lack of earning power and its obligations, had already been presented to the Commission.

First Period (1937-1940). The first plan proposed by the New Haven provided for the joint reorganization of the Old Colony and the New Haven, and was filed with the Commission in June, 1937. The testimony and evidence presented at the hearing before the Commission in July in support of the proposed joint reorganization gave the Commission at the outset a substantial knowledge of the Old Colony, its properties and its problems. The Old Colony Railroad Company, the Old Colony Shareholders' Protective Committee, the Old Colony Trust Company, as Trustee of the Old Colony First Mortgage, and the Mutual Savings Bank Group (which at that time held over $7,000,000 of the $16,448,000 outstanding Old Colony Bonds) were all represented by counsel at the first hearing (ICC R. 1-259).

The second hearing before the Commission was held in September, 1937. The Old Colony parties were again represented by counsel, who took an active part in the cross-

examination of the witnesses who had testified at the July hearing. The Insurance Group, however, took the position at the September hearing that because of its tremendous operating deficits the Old Colony properties should be reorganized separately. This action placed squarely before the Commission the question whether the Old Colony should be included in the reorganized New Haven and, if so, on what terms (ICC R. 259-733).

The third hearing before the Commission began November 9, 1937 and continued for six days. In the meantime Old Colony parties had filed various proposals for the joint reorganization of the New Haven and the Old Colony. At the hearing the proponents of the various plans and proposals presented supporting testimony and evidence; the witnesses for the Old Colony parties included two experts on railroad operations who testified at length concerning the Old Colony, its properties and their value in reorganization (ICC R. 737-2223). The briefs filed after the hearing covered in detail the nature and value of those properties and the various proposals for reducing their operating deficits. In June, 1938 an I. C. C. examiner's report was issued which recommended that no plan for the New Haven be approved by the Commission at that time.

This testimony and evidence before the Commission demonstrated that reorganization of the Old Colony jointly with the New Haven could only be justified in the public interest if the Old Colony operating deficits could be permanently eliminated or substantially reduced. In June, 1938 upon the basis of a survey prepared by the Trustees at their request, the Old Colony Railroad Company, the Old Colony Shareholders' Committee and the Mutual Savings Bank Group petitioned the District Court for the immediate discontinuance of passenger service at 88 stations on the Old Colony lines (R. 4443-4451). After

hearing, the District Court directed the discontinuance asked for, but its order was reversed by the Circuit Court of Appeals in *Converse* v. *Massachusetts,* 101 F. (2d) 48 (1939). This Court sustained the Circuit Court in *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939), but made it clear that while the District Court could not alone disregard local regulatory bodies in such matters, that could be done by the Commission and the District Court "as part of a complete plan of reorganization for an insolvent road" (308 U. S. 79, 88).

In the meantime, in August, 1938 the District Court upon its own motion had appointed a Committee of railroad experts headed by Professor William J. Cunningham, Professor of Transportation at Harvard University, to study and report upon the operations of, and possible economies on, the Old Colony and Boston & Providence lines. After extensive investigation the Cunningham Committee reported that it had found no way to bring about substantial decreases in the Old Colony operating deficits short of completely abandoning large portions of the Old Colony lines or discontinuing by far the major portion of its passenger service. The studies made it plain that the major cause of these deficits was passenger service on the so-called "Boston Group", comprising the commuting lines from Boston to Middleboro and Plymouth. The Cunningham Committee report and studies were made part of the record before the Commission (Original Report (Div. 4), R. 7, 917).

In October, 1938, the Commission reopened the record and permitted the Debtor to file a revised plan. In its revised plan the Debtor abandoned its earlier proposal for joint reorganization of the New Haven and the Old Colony, stating subsequently that it was "not willing to take over the properties of the Old Colony unless it is

finally and permanently relieved of any obligation to operate passenger service over the lines of the so-called Boston group.'"[1] Seven of the amended plans or proposed modifications of the Debtor's amended plan thereafter filed with the Commission by other parties dealt specifically with the Old Colony and its properties, particularly the amended plan of Old Colony Railroad Company which was based upon the studies then being made by the Cunningham Committee, and called for joint reorganization as a part of the New Haven although upon varying terms.

At the request of the Old Colony parties, hearings before the Commission on these plans and amendments were postponed until the Cunningham Committee studies were completed, and did not begin until June 14, 1939, continuing thereafter for three days to permit the proponents of the various amended plans and proposals to present their supporting testimony and evidence. The evidence included extended testimony by Professor Cunningham regarding possible ways of reducing the Old Colony operating deficits and concerning the value of its properties to the reorganized company (ICC R. 2229-3044). Briefs were again submitted, those of the Old Colony parties covering exhaustively the question of the value of the Old Colony properties to the reorganized New Haven.

Late in 1939 a second examiner's proposed report was issued. It recommended a plan of reorganization for the New Haven and that no plan should be approved at that time for Old Colony. All of the Old Colony interests objected vigorously to this latter recommendation in formal exceptions filed with the Commission and later in oral arguments made by their counsel before Division 4 of the Commission in December, 1939.

---

[1] Statement of Position, June 5, 1939, p. 6.

Division 4 issued the first Report and Order approving a plan of reorganization for the New Haven in March, 1940 (R. 7,869-8,036). With respect to the New Haven proper it was similar to the plan recommended by the examiner, and as regards Old Colony, Division 4 concluded—

> "On the basis of the data of record, the acquisition by the principal debtor of the Old Colony's properties and the assumption of the direct responsibility for their future operation would entail the assumption of an extremely onerous financial burden which, in our opinion, would be unfair to the creditors of the principal debtor and contrary to the broad public interest, in that it may impair the ability of the principal debtor to render efficient, economical and safe service on the remainder of its system (R. 7,920).
>
> • • • • • •
>
> "We conclude, therefore, that we should refuse to approve, at this time, the Old Colony's plan of reorganization or a plan of reorganization for the Old Colony, or the acquisition of all or any part of its property by the reorganized principal debtor" (R. 7,921).

Commissioner Eastman dissented regarding Old Colony. Certified copies of this Report and Order were filed with the District Court in March, 1940 (R. 7,775).

Petitioners refer briefly to the Division 4 Report and Order, but they fail even to mention the three years of hearings before the Commission and the extensive study and consideration given to the Old Colony problems by the Commission during that period.

Second Period (*1940-1947*). Upon petition of Old Colony interests and over the protests of New Haven parties, the Commission in August, 1940 reopened the pro-

ceedings before it to receive further evidence solely on the question of inclusion or exclusion of Old Colony. Despite the fact that by this time the question of the inclusion or exclusion of Old Colony had become the major issue in the reorganization, and despite the fact that this fifth hearing before the Commission was solely concerned with recording additional testimony and evidence relevant to this issue, Petitioners do not even mention it. The hearing began September 9, 1940 and continued for three days. The Old Colony interests, including in addition to those already mentioned the Commonwealth of Massachusetts, the Special Railroad Commission appointed by the Massachusetts Legislature, the City of Boston and the Old Colony Commuters & Shippers League, called seventeen witnesses who testified concerning the Old Colony and its operations; more than 30 additional exhibits were introduced. Over 450 pages of testimony were recorded; this, together with the testimony concerning Old Colony previously received, totaled over 1,000 pages, or more than 25% of the entire record before the Commission. The evidence presented at the September hearing showed that some savings had been achieved and that the Old Colony operating deficits, which were then running at about $1,150,000 a year, could be somewhat further reduced (ICC R. 3295-3775). Briefs were again filed and oral argument before the full Commission took place in October, 1940, with all of the Old Colony parties participating.

Meanwhile, the Old Colony Trustees had instituted proceedings before the Commission for the complete abandonment of the Boston Group, testimony and evidence in support of the abandonment had been submitted, and an examiner's proposed report recommending abandonment had been issued. But on February 18, 1941, the Commission issued a Report and Order in which it refused to

approve the abandonment of the Boston Group, although agreeing that "much remains to be done before it (passenger service on the Boston Group) will be self-supporting".[1] The same day the Commission also issued a Supplemental Report and Order which for the first time provided for joint reorganization of the New Haven and the Old Colony (R. 8,037-8,114). The Commission recognized, however, that the conditions under which the Old Colony operates "are such that it cannot endure the present heavy loss from passenger service" (R. 8,063), and that this loss "must be eliminated or reduced to relatively small proportions, if a sound, feasible, and fair plan of reorganization for the Old Colony is to be approved at this time" (R. 8,063). This modified plan included a provision intended to enable the reorganized New Haven, subject to Commission approval, to relieve itself from any obligation to continue passenger service on Old Colony's Boston Group if the Old Colony's operating deficits should continue at a high level during 1941 and 1942 or the five years ending 1945. Commissioners Mahaffie, the Commissioner who had attended most of the hearings, and Porter dissented, Commissioner Mahaffie stating:

> "* * * I would not require the New Haven security holders to assume that burden. If the public insists on service that costs more than is paid for it the deficit should be made up by a public assessment rather than by one levied against the New Haven bondholders" (R. 8,081).

The Commission certified its modified plan to the District Court, where all parties had an opportunity to file objections and supporting briefs and to take part in the

---

[1] *Old Colony Railroad Company et al., Trustees' Abandonment,* 244 I. C. C. 303, 334 (1941).

argument in June, 1941 (R. 7,775-6; 8,531-2). At the argument, the District Court appointed a committee of four members, consisting of counsel for the Old Colony Railroad Company, the Commonwealth of Massachusetts and the Insurance Group, and a member of the Trustees' staff, to endeavor to work out a solution of the Old Colony problem.[1] That Committee made a report (R. 9,013-9,031) which the Court subsequently attached to its opinion and commended to the Commission. With respect to Old Colony, the Court held that the provisions for its joint reorganization with the New Haven were unfair and discriminatory against New Haven's secured creditors and that the limited assurance provided in the Plan against unreasonable Old Colony passenger operations were of doubtful validity and effectiveness (R. 8,923-8,964). The Court disapproved the Plan and referred the proceeding back to the Commission in accordance with subsection (e) of Section 77 (R. 9,067).

The Commission then, for the fourth time, reopened the record to receive such additional evidence as any party

---

[1] Petitioners' statement regarding the appointment of this Committee, namely, that "thus, within the slightly more than four months of the time when the Commission first certified a plan for Old Colony, the Court had diverted the proceedings into the channels of compromise", leaves the inference that the District Court should have disapproved the plan and referred it back to the Commission without any effort to work out a solution of the Old Colony problems. Possibly such procedure would have been justified if, as Petitioners intimate, the Old Colony problems had been under consideration for only four months. But the Commission had been holding hearings, hearing arguments and receiving briefs concerned wholly or in part with Old Colony problems not for four months, *but for four years*. In their effort to make the action of the District Court appear objectionable, Petitioners disregard the fact that the very provisions of the Plan which may keep the Old Colony operating deficits within limits, which to a considerable extent give Old Colony such value as it may have for reorganization purposes, and to which therefore Petitioners do not object, are attributable to the work of the Committee appointed by the District Court in June, 1941. As to the propriety of the District Court's action, see *Gardner v. New Jersey*, 91 L. ed. 410 (1947).

might wish to introduce. The subsequent hearings, which were the sixth, began February 17, 1942 and continued for four days. Thirteen witnesses testified for seven parties, the record of their testimony exceeding 500 pages. Fifty-three additional exhibits were introduced. Professor Cunningham testified as an expert witness for the Mutual Savings Bank Group regarding the value of Old Colony's properties for reorganization purposes. Two witnesses testified for the Massachusetts Special Railroad Commission regarding the efforts of that Commission to assist in reducing the Old Colony operating deficits (ICC R. 3778-4334).

Petitioners took part in the New Haven reorganization for the first time at the February, 1942 hearing, and now disregard practically everything that had previously transpired in this proceeding. Although over six months had elapsed since their organization as a Committee, and although in their intervention petition before the Commission they had specifically asked that they be granted the right to "produce and cross-examine witnesses", Petitioners did not offer any evidence at the February hearing, either in the form of testimony or as exhibits. Their counsel made a statement to the effect that Petitioners were not satisfied with the Commission's plan "that was turned down by the Court" and that they were not getting "anywhere near enough the strategic value of the Old Colony Railroad". But he did not cross-examine either Professor Cunningham or the witnesses of the Massachusetts Special Railroad Commission, although he did question one of the Debtor's witnesses regarding the segregation formula approved by the Commission in 1938.

Petitioners now try to excuse their inactivity at the February, 1942 hearing on the ground that "no evidence was there introduced which would serve in any way to sup-

port a reduction by the Commission of the value of the Old Colony property" from the determinations made by the Commission in February, 1941 (Petition, pp. 9-10). But this excuse completely ignores the controlling fact that the reason for the hearings was the District Court's decision that the Old Colony features of the Plan were discriminatory against New Haven's secured creditors. Consequently, the burden was not, as Petitioners imply, upon other parties to come forward with evidence to support a reduction of the Commission's earlier valuation of the Old Colony properties, but rather upon the Old Colony parties, including Petitioners, to present evidence to overcome the effect of the District Court's holding of discrimination. If, as suggested by Petitioners, the evidence regarding Old Colony did not bulk large at that hearing, it was because the Commission's record with respect to Old Colony's operations and value had practically reached the saturation point.

After all of the evidence was in at this hearing the record was held open to receive such further proposals as the Committee appointed by the District Court might desire to make regarding the Old Colony, particularly with reference to terms for its joint reorganization with the New Haven. The so-called "Joint Report" (Stip. R. II, No. 36, pp. 133-166) was filed pursuant to this ruling. It contained, with but little modification, the proposals originally made by the Court Committee for limiting the Old Colony losses to be borne by the reorganized Company, and stated the joint views of the Mutual Savings Bank Group, as holders of a substantial amount of Old Colony Bonds, the Debtor, and the Insurance Group as to the amount of new securities the holders of Old Colony Bonds should receive in a joint reorganization of the Old Colony and the New Haven. When the record was held open it was expressly stated that any party would have the right after the filing of the Joint

Report to petition the Commission for a further hearing after the filing of any proposal by the Committee,[1] but no such petition was filed by Petitioners. Briefs were submitted to the Commission by all parties, including Petitioners, in which their positions with respect to the Joint Report were stated in full. Petitioners' brief contained alternative proposals "on the basis of the entire record in these proceedings" with respect to, first, the Old Colony "included in the Plan", and second, the Old Colony "excluded from the Plan". These alternative proposals were supported by detailed argument, and Petitioners argued at length in opposition to the terms for joint reorganization contained in the Joint Report. Nowhere in their brief, however, did Petitioners criticize the record before the Commission as inadequate. This fact, together with Petitioners' failure to introduce any evidence at the February hearing and their failure to ask the Commission for further hearings after the filing of the Joint Report, can only mean that they were satisfied then that the record before the Commission with respect to the Old Colony was full and complete.

The Commission issued its Third Supplemental Report and Order in October, 1942 (R. 9753-9862). Nearly half of the Report was devoted to the Old Colony, its properties and the various proposals before the Commission regarding it (R. 9,780-9,800). The Report discussed Petitioners' proposals, as well as those of the Old Colony First Mortgage Trustee, noting that Petitioners

> "introduced no evidence in support of [their] proposals and rely upon evidence relating to the value of the assets of the Old Colony heretofore received in the record."

---

[1] Petitioners' statement (Petition, p. 12) that "they were permitted to file briefs only" completely ignores this ruling.

The Order modified in certain respects the terms provided in the Plan for the joint reorganization of the New Haven and the Old Colony. The modified terms were similar to the provisions recommended in the Joint Report. Under them, the holders of Old Colony Bonds would receive $3,289,600 new fixed interest bonds and $2,467,200 new income bonds, after the satisfaction of the New Haven's prior lien claim (R. 9,853-4).

Although over twenty parties petitioned the Commission for modification of its Third Supplemental Report and Order, Petitioners did not (R. 10,130-1). In July, 1943,[1] the Commission issued its Fourth Supplemental Report and Order (R. 10,129-10,227). This denied the petitions for modification and reaffirmed the provisions for joint reorganization approved the preceding October with but one change, which gave the Commonwealth of Massachusetts an option to purchase the Boston Group if, as the result of continuing excessive operating deficits, the reorganized company should discontinue passenger service on the Old Colony (R. 10,210-10,217). The Plan was then certified to the District Court (R. 10,230).

In August, 1943, Petitioners, as well as the other Old Colony interests, filed objections to the modified Plan. The District Court held hearings on these objections in September and October, 1943, after which briefs were filed by all parties. The Court's decision of December, 1943 generally approved the Commission's Plan (R. 10,695-10,763) but held that certain corrections, including an increase in securities issuable to the Old Colony bondholders, should be made. This increase reflected the actual segregated

---

[1] After this Court's decisions in the *Western Pacific* and *Milwaukee* cases in March, 1943. *Ecker* v. *Western Pacific Railroad Corporation*, 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523.

earnings of Old Colony during 1942 and 1943 which, due to war conditions, had exceeded the Commission's estimate by about $2,000,000. This correction was ratified by the Commission's Fifth Supplemental Report and Order issued in February, 1944 (R. 10,833-10,928).[1] On the basis of the record before the Commission regarding the probable market value of the new securities, the combined market value of the $4,398,305 fixed interest bonds and $3,298,728 income bonds distributable to Old Colony bondholders under the Plan is approximately $5,500,000, which exceeds the $5,200,000 combined market value of the securities which would have been so distributable under the Commission's first plan for the joint reorganization of Old Colony and the New Haven.

After the filing of briefs and further objections the District Court held a hearing on the Fifth Supplemental Report and Order in March, 1944, at which the Old Colony parties, including Petitioners, appeared and were heard. The District Court's decision and order approved the Fifth Supplemental Report and Order in all respects (R. 11,024-11,055).[2]

Petitioners were the only Old Colony parties who appealed from the District Court's order. After briefs and argument the Circuit Court of Appeals rendered an opinion in January, 1945 affirming the District Court's decision in all but two respects (R. 11,525-11,545).[3] It held that there was an error of law in the treatment of certain of the New Haven's bank creditors, and, as regards Old Colony, that it was not clear that the Commission had exercised its independent judgment in determining the value of the Old

---

[1] Stip. R. I, No. 1.

[2] 54 F. Supp. 631 (1944), Prior S. C. R., vol. A, Ex. 16.

[3] 147 F. (2d) 40 (1945).

Colony properties and the treatment to be accorded the holders of Old Colony Bonds. As to this, the Circuit Court said:

> "It is possible, of course, that the Commission may still adhere to figures which are the same as those of the Joint Report. Such correspondence would not in itself invalidate the Commission's conclusions if it 'shall state fully the reasons for its conclusions,' as required by Section 77(d), and such reasons are not the pressure exerted by the compromise" (147 F. (2d) 40, 50).

The Circuit Court returned the case to the District Court for further proceedings, and gave the District Court leave to remand to the Commission all or any portions of the plan if, in its discretion, it was desirable to have the Commission consider further "any provisions of the plan in addition to those affecting the Old Colony" (147 F.(2d) 40, 53).

The District Court determined that there were no circumstances requiring further consideration by the Commission of any features of the plan other than certain of the provisions affecting the Old Colony, and on February 13, 1945, remanded those provisions to the Commission for further consideration (R. 11,582-3).[1] Petitioners appealed from this order primarily upon the ground that it limited the scope of the Commission's reconsideration in a manner inconsistent with the Circuit Court's opinions of January 2 and 23, 1945. The Circuit Court of Appeals, held, however, that the District Court's order imposed no limitation upon the Commission's reconsideration of the Old Colony questions (R. 11,891-11,914).[2]

---

[1] Stip. R. I, No. 1.

[2] 150 F. (2d) 169 (1945), Stip. R. I, No. 11.

After the District Court remanded the Plan to the Commission, Petitioners filed a petition for a further hearing before the Commission.[1] They alleged that there had been material changes in the financial condition and strategic position of the Old Colony during the war period after the close of the hearings before the Commission and that to appraise fairly the value of the Old Colony properties there should be, as summarized by the Commission in its Sixth Supplemental Report:

> "* * * (1) a complete examination of the books of account and records of the principal debtor's trustees for the purpose of determining the adequacy and reasonableness of the credits and charges allocated to Old Colony by the trustees under the segregation formula for the period, January 1, 1941, to date; (2) a complete examination and determination of the amount of the prior-lien claim of the principal debtor's trustees against Old Colony in the light of the earnings of Old Colony for the years 1941 to 1944, inclusive, and a reestimate of earnings for the year 1945 and thereafter; (3) a complete examination of the books of account and records of the principal debtor's trustees for the purpose of determining or forecasting the value of the unsecured claim of Old Colony against the principal debtor for disaffirmance of the Old Colony lease, and the value of the bonds of the principal debtor owned by Old Colony; (4) a complete examination of the books of account and records of Union Freight Railroad Company for the preceding 10 years for the purpose of appraising the value of the the one-half interest of Old Colony therein; (5) a complete examination of the books of account and records of the Boston Terminal Company for the period September 1, 1939, to date, for the purpose of determining the adequacy of the proportions of the

[1] Stip. R. II, No. 23, pp. 19-32.

terminal charges or credits allocated to Old Colony by the principal debtor's trustees; and (6) a re-examination of the earning capacity of the Old Colony operating properties in the light of the foregoing and in the light of the modification of its operating losses by reason of the provisions of the plan relative to Boston Terminal Company which have been affirmed by the circuit court of appeals" (Stip. R. I, No. 3, pp. 11,684-5).

The Commission issued its Sixth Supplemental Report and Order in May, 1945 (R. 11,682-11,703).[1] The Report specifically considered Petitioners' request for a further hearing and the nature of the matters therein specified as requiring further examination by the Commission. It referred to the voluminous evidence already of record in respect to such matters, and pointed out that Petitioners had made no effort to supplement the record at the last hearing before the Commission, although ample opportunity to do so had been given. The Commission concluded that it was neither necessary nor desirable to hold further hearings.

The Commission's Report then discussed in detail the evidence of record relating to the value of the various Old Colony properties. It set forth the amounts of new securities of various classes that would be issuable against the assets of the Old Colony upon the basis of certain assumptions and emphasized that the value of the Old Colony properties and assets should not be determined solely by mathematical calculations, before concluding as follows:

"Upon further consideration and taking into consideration the prior-lien claim of the principal debtor's estate, the uncertainty to which some of the items comprising the non-operating assets of Old Colony are subject, the results of the segregation and

[1] Stip. R. I, No. 3.

> severance studies, the probable future segregated earnings, and the advantages of the settlement of pending claims; considering also the general public interest; we conclude and find that the price to be paid for Old Colony properties, franchises, and assets upon the terms, and conditions and under the limitations, set forth in the modified plan of reorganization approved by us in our report and order of October 6, 1942, as modified and corrected by our reports and orders of July 13, 1943, and February 8, 1944, should be approved'' (R. 11,701).

This Report and Order effected no change whatsoever in the plan embodied in the Commission's Fifth Supplemental Report and Order.

At the hearing before the District Court in July, 1945 on the Commission's Sixth Supplemental Report and Order, Petitioners offered certain evidence relating primarily to the value of the new securities to be issued in the reorganization.[1] This evidence, in general, indicated that in the opinion of the witnesses at the time of the hearing the market values of the proposed new securities were substantially greater than the values indicated by the evidence before the Commission. The District Court considered this evidence and held (R. 11,891-11,914)[2] that it did not constitute a sufficient showing of changed circumstances to warrant returning the proceedings to the Commission for further consideration. After the hearing, the District Court reinstated (Order No. 821)[3] its Order (No. 734)[4] approving the plan as set forth in the Commission's Fifth Supplemental Report and Order, no provision of which had

---

[1] Stip. R. II, No. 25, pp. 49-67.
[2] Stip. R. I, No. 11.
[3] Stip. R. I, No. 12, pp. 11,922-3.
[4] Stip. R. II, No. 21, pp. 11-16.

been modified by the Sixth Supplemental Report and Order and entered its further Order (No. 822)[1] confirming the plan under subsection (e) of Section 77.

Petitioners then appealed to the Circuit Court of Appeals, which, after the filing of two sets of briefs and two arguments by counsel, affirmed[2] the action of the District Court, and later denied a petition for rehearing. It is this decision that Petitioners seek to have reviewed by this Court.

ARGUMENT.

POINT I.

The Commission's treatment of the reorganization as a system reorganization of the Old Colony and the New Haven raises no question that need be reviewed by this Court.

Petitioners ask this Court to determine whether the standards of valuation applicable to the Old Colony's properties for the purposes of the Plan do not differ from those approved by this Court in the *Milwaukee*[3] and *Western Pacific*[3] cases, and reaffirmed in the *Denver*[3] case (Questions 1 and 4). They contend that the standards which should be applied in the case of the Old Colony "are those necessary to determine a 'fair upset price' for a sale under

---

[1] Stip. R. I, No. 13, pp. 11,924-32.

[2] Stip. R. I, No. 15, pp. 12,655 *et seq.*

[3] Controlling opinions of this Court as to the interpretation of Section 77 are *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523 (1943); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943); *Reconstruction Fin. Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495 (1946) and *Insurance Group* v. *Denver & R. G. W. R. Co.*, 91 L. ed. 436 (1947), herein referred to as the *Milwaukee*, *Western Pacific* and *Denver* cases, respectively.

Section 77(b)(5)" (Questions 2 and 3) and that such standards are "those set forth in *First National Bank* v. *Flershem*", 290 U. S. 504 (1934) (Question 3), which involved an equity receivership of a debtor that was in fact solvent in both the bankruptcy and the equity senses.

A. The standards of valuation approved by this Court in the *Milwaukee* and *Western Pacific* cases are applicable to the Old Colony for the purposes of its reorganization as a part of the Plan for the New Haven.

Section 77(e) directs that the Commission shall make any necessary determination of "the value of any property for any purpose under this section". This Court in the *Milwaukee* and *Western Pacific* cases has held that valuation is exclusively the function of the Commission, as to which "judicial reexamination was not considered necessary". Despite the emphasis put upon earning power for valuation purposes by Section 77(e), with no reference in the statute to a cash valuation for any purpose, Petitioners urge that the provisions for inclusion of the Old Colony properties in the joint reorganization should reflect the "absolute" "fair cash sale value" of those properties. Such a procedure would call for creation of completely new standards of valuation.

In discussing the manner in which the Commission must discharge its duties in regard to valuation, this Court has expressly recognized the impossibility of placing exact dollar valuations upon properties for reorganization purposes and has clearly indicated the latitude of judgment which must be exercised by the Commission in this regard. Thus in the *Milwaukee* case, this Court has said (318 U. S. 523, 561):

> "The problem in such a case is not a simple one. The contribution which each division makes to a system is not a mere matter of arithmetical computa-

> tion. It involves an appraisal of many factors and the exercise of an informed judgment. Furthermore, an attempt to put precise dollar values on separate divisions of one operating unit would be quite illusory."

and at page 565:

> "A requirement that dollar values be placed on what each security holder surrenders and on what he receives would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process."

The Court's statements in the *Western Pacific* case are to the same effect (318 U. S. 448, 472):

> "The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise. One of the primary objects of the bill was the elimination of obstructive litigation on the issue of valuation and the form finally chosen approached as near to that position as seemed to the draftsmen legally possible."

and at page 483:

> "Under such circumstances the lack of a valuation in dollars is immaterial. The important element is the allocation of the securities so as to preserve to creditors the advantages of their respective priorities."

In the *Denver* case this Court has recently reiterated the same principles (91 L. ed. 436, 443):

> "When the Interstate Commerce Commission finds the value of a railroad system by any means, the correctness of the result cannot be mathematically proved or disproved. The difficulties of appraisal

> are multiplied by the necessity of looking into the future to estimate earnings."

As a basis for advocating this radical departure from the principles heretofore established, Petitioners point out that Old Colony holds title to its properties as a separate corporate entity and that as a result of disaffirmance of the Old Colony lease coupled with continued operation of the properties by the New Haven Trustees for the account of Old Colony pursuant to Section 77(c)(6) Old Colony has certain claims against the New Haven and the New Haven has a prior lien claim against the Old Colony. These factors are incidental only and do not alter the basic fact that in this reorganization Old Colony is on the same footing for valuation purposes as a divisional lien of the New Haven.

There is but a single reorganization proceeding here. The Old Colony is a party to that proceeding under Section 77(a) which provides:

> "Any railroad corporation the majority of the capital stock of which * * * is owned * * * by any railroad corporation filing a petition as a debtor may file, with the court in which such other debtor has filed such a petition, and in the same proceeding, a petition * * * stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of such other debtor; * * *."

That the legislative purpose of this provision is to further the continuity of system operations seems apparent. Simplification of railroad capital structures generally requires the elimination of many if not all divisional liens. In some cases the principal debtor will have acquired title to the divisional properties with or without assuming the liens thereon and in others, as in the case of Old Colony, title to the divisional properties may have remained in a subsidiary.

The provisions of Section 77(a), which is operative only in instances involving separate corporate entities, were designed to eliminate legal impediments to a system reorganization in the latter type of case. Different incidental problems such as the liability of the parent for obligations of the subsidiary and the settlement of claims as between parent and subsidiary may exist, but nowhere in the statute is there any indication that the Commission is required to apply one standard of valuation in instances where divisional properties are owned directly by the principal debtor and another where the title is in a subsidiary. The provisions of Section 77(e) which require the Commission to value any property for any purpose with emphasis primarily upon earning power apply to subsidiary debtors with the same force as to principal debtors.

Petitioners contend that the application to the Old Colony of the valuation standards used in the *Milwaukee* and *Western Pacific* cases "appears to be plainly in conflict with the views of this Court" in *Palmer* v. *Webster & Atlas National Bank,* 312 U. S. 156 (1941). But that case had nothing to do with valuation for the purposes of a reorganization plan, much less the question whether various standards of valuation are required by Section 77. It involved solely the question whether Section 77(c)(6) required the New Haven Trustees to advance funds of the New Haven estate for the payment of certain Old Colony obligations when their payment was not essential to the continued maintenance of railroad service on the Old Colony lines.

Petitioners base their argument for a different standard of valuation wholly upon the theory that the plan requires a "sale" of the Old Colony properties. They rely upon one of the optional methods for execution of the plan provided in Section 77(b)(5), namely, a "sale at a fair upset price", ignoring completely the preceding clauses which permit

the "transfer * * * of all or any part of the property of the debtor to another corporation" and "the merger or consolidation of the debtor with another corporation". The connotation of the word "sale" as distinguished from "transfer" or "merger or consolidation", contended for by Petitioners, has significance only if there be a willing purchaser. Such is not the case here. The record in this case has demonstrated that the Old Colony is unable to earn its operating expenses, and for this reason its reorganization as a part of the New Haven was bitterly opposed by New Haven creditors. In the Commission's (Division 4) original Report in March, 1940, the majority determined that the Old Colony should not be reorganized as a part of the New Haven on the grounds, among others, that it would be unfair to the creditors of the New Haven, but Commissioner Eastman dissented, stating (R. 8001-2):

> "The Commission, however, has both the right and the duty, in passing upon the reorganization plan, to consider whether or not the public interest requires that these properties remain parts of one system and that provision to that effect be made in the plan."

At the reopened hearings before the full Commission, Commissioner Eastman's view prevailed and the Commission's Report of February, 1941 required reorganization of the Old Colony as a part of the New Haven. At the outset of that Report the Commission stated (R. 8050):

> "The Commonwealth of Massachusetts, and those parties who may be designated as representing the public, contend that not only is the acquisition of the Old Colony properties and the operation of all of its lines by the principal debtor justified financially, but that any plan not providing for the inclusion of the Old Colony as a part of the principal debtor's

> system would be incompatible with the public interest."

and in the course of its consideration it pointed out (R. 8063):

> "The conditions under which the Old Colony operates are such that it cannot endure the present heavy loss from passenger service. This loss must be eliminated or reduced to relatively small proportions, if a sound, feasible, and fair plan of reorganization for the Old Colony is to be approved at this time. Nor can the property be operated successfully, except as a part of some larger railroad system, even if such relief is obtained."

The District Court withheld approval of that plan since, in view of the Old Colony's operating deficits, it did "not feel justified in imposing an involuntary merger upon the parties upon the terms proposed" (R. 8956). But after the District Court hearings the New Haven creditors withdrew their opposition to a joint reorganization and joined with the other parties in attempting to evolve a plan that would give effect to the Commission's insistence upon a system reorganization. Thus, the basic controversy as to whether or not the New Haven and Old Colony should be reorganized jointly, which had lasted for over four years, had been removed prior to Petitioners' intervention in the proceedings. And contrary to the contention of the Petitioners, it has been urged in this proceeding from the time of the early hearings before the Commission that Old Colony is merely one portion of the New Haven and should be reorganized as such.[1] This view was ultimately adopted by the Commission (R. 10,908).

---

[1] See, for example, brief dated January 15, 1938 before the ICC, Mutual Savings Bank Group, pp. 75 *et seq.*

B. Section 77(b)(5) does not require the fixing of an "upset price" for the Old Colony's properties for the purposes of the Plan.

Petitioners ask this Court to review the question whether Section 77(b)(5) requires the fixing of an "upset price" for the Old Colony properties (Questions 2 and 3). If the answer to that question should be in the affirmative, Petitioners also ask this Court to determine whether the fixing of an "upset price" necessitates finding the "fair cash value" of each item of the Old Colony properties and the "probable market or cash value" of the securities distributable under the Plan to the Old Colony bondholders (Question 3). If the fixing of an "upset price" is not required by Section 77(b)(5), then consideration of the second question mentioned above is unnecessary.

The Circuit Court of Appeals, one judge dissenting, held that the provision of Section 77(b)(5) permitting the sale of the property of a debtor at an "upset price" is "optional, not mandatory" and consequently that even if the provisions of the Plan which provide for the transfer of Old Colony's properties to the reorganized New Haven, the discharge of the New Haven estate's prior lien upon those properties, and the issuance of securities of the reorganized New Haven to Old Colony bondholders, could properly be described as a "sale", nevertheless, the statute does not require the fixing of an "upset price".

The Circuit Court's interpretation of Section 77(b)(5) is sustained beyond any question by the specific language of that subsection, by its legislative history, by its relationship to other provisions of Section 77, and by the interpretation placed upon it in other cases under Section 77. The pertinent part of Section 77(b)(5) provides that the plan of reorganization

> "shall provide adequate means for the execution of the plan, which *may* include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, *the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price,* the distribution of all or any assets, *or the proceeds derived from the sale thereof,* among those having an interest therein, * * *." (Emphasis added.)

The only mandatory part of this provision is the requirement that the plan "shall" provide adequate means for its execution. The remainder of clause (5) is permissive: the "means" chosen "may" include any of the methods listed. The statutory list of methods is not even exclusive, for the first paragraph of subsection (b) ends with a provision that the plan "may include any other appropriate provisions not inconsistent with this section."

The legislative history of clause (5) shows that the italicized language above was intended to add an additional, alternative method for carrying out a plan. Clause (5) was not contained in Section 77 as originally enacted in 1933, but was added when Section 77 was amended in 1935. The 1935 amendments were contained in H. R. 8587, which in turn was derived from H. R. 6249 recommended by Joseph B. Eastman, Federal Coordinator of Transportation. As this Court noted in the *Denver* case (90 L. ed. 1134, 1153-1154), one of the major objectives of the 1935 amendments was to provide a method for dealing with the problem of dissenting creditors. This was accomplished by amending subsection (e) of Section 77 to permit the con-

firmation of plans by the courts over the objections of creditors under the so-called "cram-down" provision, thus eliminating the need for foreclosure sales involving the fixing of "upset prices", which was the procedure employed in equity receiverships to carry out plans of reorganization. The bill (H. R. 6249) sponsored by Commissioner Eastman contained the "cram-down" provision, but did not contain any provisions regarding sales at upset prices. The italicized language above was inserted after the hearings on H. R. 6249, during which several witnesses expressed concern over the constitutionality of the proposed "cram-down" provision, one witness[1] specifically urging the inclusion of a permissive, alternative provision authorizing foreclosure sales at not less than "fair upset prices".

Under Section 77, as so amended, the sale-at-an-upset-price provision is thus an additional, alternative means for the execution of the plan. It is in addition to the other specified methods of passing title to the properties of a debtor railroad to another corporation, such as "transfer", "merger" and "consolidation", the first two of which more accurately describe the provisions dealing with Old Colony in the Plan. But its legislative history shows, and the draftsmen of the 1935 amendments later confirmed,[2] that the sale-at-an-upset-price provision was primarily intended as an alternative for the untested "cram-down" procedure of subsection (e). To this extent it carried into the amended

---

[1] C. M. Clay, then counsel for the Railroad Division of Reconstruction Finance Corporation, which was at the time the largest single holder of railroad securities. *Hearing before House Committee on the Judiciary on H. R. 6249*, 74th Cong., 1st Sess. (1935) 130.

[2] Leslie Craven and Warner Fuller, in *"The 1935 Amendments of the Railroad Bankruptcy Law"* (1936) 49 Harv. L. Rev. 1254, 1268-1272.

Section 77 the "artificial procedural technique used to drive creditor and equity interests into the reorganization plan".[1]

The foregoing is consistent with the interpretation that has been placed upon subsection (b)(5) by the Commission in other cases under Section 77. For example, in *Spokane International Ry. Co. Reorganization,* 233 I. C. C. 157 (1939), the Commission approved a plan containing a permissive sale-at-an-upset-price provision, saying, with respect to the pertinent part of subsection (b)(5):

> "The purpose of the sale provision as contained in the bondholders' plan, as stated by its proponents, is to secure to the reorganized company property which will be more nearly immune from attack by nonassenting classes of creditors upon possible grounds of unconstitutionality of the provisions in section 77 permitting confirmation of a plan of reorganization other than according to principles applicable to compositions."

The sale-at-an-upset-price provisions adopted by the Commission all begin substantially as follows:

> "If so ordered by the court, the plan may be executed by a sale or sales, at not less than fair upset prices to be fixed by the court * * *." *Spokane International Ry. Co. Reorganization,* 233 I. C. C. 157, 184.

Thus, even in those cases where the Commission has exercised its option and included such provisions in its approved plans, it has been unwilling to make the provisions manda-

---

[1] *Op. cit.* 1271. Neither in equity receivership nor under Section 77 as originally enacted had the upset price device furnished an adequate basis for the adjudication of property rights dependent upon the value of assets. The fixing of an upset price never purported to be an actual determination of value. The 1935 amendments of Section 77 sought to remedy this situation, and the deficiencies of the valuation provision of Section 77 as originally enacted, by placing the determination of value for reorganization purposes in the hands of the Commission. The determinations of the Commission then become the basis for the exercise by the Courts of their power under the "cram-down" provision.

tory but has left it to the courts to decide whether or not the plans should be executed by means of sales at upset prices. The option to include or not to include such a provision is specifically given the Commission by subsection (b)(5), and the Commission was wholly within its rights under Section 77 in not including such a provision in its Plan for the New Haven.

While ostensibly Petitioners' argument denies the unitary character of the sale-at-an-upset-price provision in subsection (b)(5) and insists that the critical words are "the sale" and that whenever a sale is involved an "upset price" must be fixed, the real significance of their argument is that by it Petitioners hope to undo the District Court's confirmation of the Plan as to Old Colony under the "cram-down" provision of subsection (e), the constitutionality of which this Court upheld in the *Denver* case.[1] Consequently, it would be a clear distortion of Congressional intent if Petitioners should be permitted to use the sale-at-an-upset-price provision of subsection (b)(5), which was intended as an alternative to the "cram-down" provision, as the means of nullifying the latter provision.

We do not believe it necessary to discuss further Petitioners' contentions that an upset price must be fixed because the Plan's provisions for Old Colony amount to a "sale", and that in fixing an upset price the principles to be applied are those set forth in *First Nat. Bank* v. *Flershem,* 290 U. S. 504 (1934). For the reasons stated at length under subdivision A of this Point, it is clear that those provisions do not amount to a "sale" and that the Plan is a single comprehensive plan of reorganization under which the Old Colony is being reorganized, to quote the Commission's Order (R. 10,908), "as a part of" the reorganization of the New Haven.

---

[1] 328 U. S. 495.

POINT II.

Neither Petitioners' criticism of the treatment of the New Haven's prior lien claim nor their contentions with respect to a deficiency on the Old Colony Bonds and the commingling of Old Colony's assets by the New Haven raises any question that need be reviewed by this Court.

Petitioners assert that if the Plan is properly one for system reorganization the New Haven's prior lien claim should be disregarded rather than satisfied (Question 5), and that the Old Colony Bonds should have an unsecured "deficiency claim" against the New Haven properties (Question 6). They also assert that the New Haven has so commingled the Old Colony's assets with its own as to be liable for the Old Colony's obligations (Question 7).

There is no basis for the contention that the New Haven's prior lien claim should be treated as a "system obligation" and disregarded rather than satisfied. This claim arose out of the reorganization proceedings as did the Old Colony's $47,000,000 breach of lease claim against the New Haven which, together with other claims against the New Haven resulting from the reorganization, have been characterized by Petitioners as the most important of Old Colony's assets. But for the existence of the separate corporate entities, those claims would not have existed on either side. As shown in Point I, Section 77(a) contemplates the joint reorganization of system properties even though owned by separate corporate entities. This does not mean, however, that claims between such entities must not be dealt with. The prior lien claim is based upon the District Court's order directing the New Haven, pursuant to the provisions of Section 77(c)(6), to operate the Old Colony's

properties for the account of the Old Colony. This did not call for the operation of the Old Colony as a separate railroad, but merely for a separation of the results of the system operation. Section 77(c)(6) makes no distinction between those cases where the lessor is a subsidiary, which is frequent in large railroad systems, and those where the lessor is not a subsidiary. The conclusion that Sections 77(a) and 77(c)(6) taken together authorize joint reorganization in cases where a subsidiary's properties have been operated for the account of the subsidiary under a disaffirmed lease, does not seem to present any question of statutory interpretation.

If the Old Colony had been required to operate its own properties, the funds necessary to make up its operating deficit, which constitute the prior lien claim, would have had to have been borrowed, presumably on an issue of trustees' certificates. If, under these circumstances, the Commission had determined that the public interest demanded a merger of the properties of the two roads, the existence of the trustees' certificates would not have barred joint reorganization. It would, however, have been necessary for the plan for the joint reorganization to deal with them in a manner consistent with their prior lien position and the result would have been the same as that in the present case.

As to Petitioners' contention regarding a so-called "deficiency claim", it need only be pointed out that by order entered in the District Court on February 4, 1938, claims against the New Haven for the principal of the Old Colony Bonds filed by the Old Colony Mortgage Trustee and the Old Colony bondholders were dismissed and disallowed by the District Court (R. 3,923-33; see also R. 3,964-66). The District Court also held that any damages for failure upon the part of the New Haven to pay interest on the

Old Colony Bonds was reflected in the $47,000,000 breach of lease claim (R. 6276).

As to the foregoing items, Petitioners would disregard the corporate entities for the purpose of asserting a deficiency claim against the New Haven and of disregarding the New Haven's prior lien claim, while at the same time recognizing those entities for the purpose of retaining their $47,000,000 breach of lease claim, their claim against Bankers Trust Company, and the $3,600,000 principal amount of New Haven First and Refunding Mortgage Bonds together with interest paid thereon in cash, all of which were acquired by the Old Colony through recognition of its separate corporate entity.

Petitioners also claim, for the first time in this proceeding, that the New Haven has so commingled the assets of the Old Colony as to become responsible for the latter's obligations. This clearly is not a claim which should, in the first instance, be considered by this Court. Furthermore, all of the New Haven's obligations under the lease with respect to the maintenance and replacement of the Old Colony's properties, roadway and equipment, were considered in fixing the damages for breach of lease. Any damages which might have resulted to the Old Colony as a result of any commingling of its assets with those of the New Haven were assessed and are reflected in the $47,000,000 damages against the New Haven for the breach of the Old Colony lease. In addition to such damages reflected in the breach of lease claim, the Old Colony also acquired the $3,600,000 of First and Refunding Bonds as a result of the failure to return certain steamship equipment leased to the New Haven.

POINT III.

Petitioners raise no question concerning the Sixth Supplemental Report that need be reviewed by this Court.

Petitioners attack the Commission's Sixth Supplemental Report on several grounds. They contend it is arbitrary and capricious and inadequately states the Commission's reasons for its findings (Question 8), that the Commission did not treat as an Old Colony asset $792,000 cash paid as interest on Old Colony's $3,600,000 First and Refunding Bonds (Question 9), and that the Commission incorrectly dealt with the value of Old Colony's claim against Bankers Trust Company (Question 10). Petitioners also contend that the Commission gave inadequate consideration to the probable market value of the new securities (Question 11).

A. The Commission's approach to the Sixth Supplemental Report.

In developing the terms of the joint reorganization and the award of securities to be made to the Old Colony bondholders the problem before the Commission was analogous to that of determining the treatment to be accorded the holders of any of the New Haven divisional mortgage bonds. The problem was complicated but not distinguished by the New Haven's prior lien claim of $10,500,000 against Old Colony and the fact that Old Colony, in turn, had certain assets acquired by it in the course of the proceedings in addition to its railroad lines. Because the New Haven's prior lien claim is preferred to all Old Colony assets, the Commission was required to satisfy itself, in developing the terms of the joint reorganization, that the Old Colony

assets are of sufficient value to satisfy that claim. In this process, the Commission made tentative appraisals and noted the evidence and conflicting claims as to the value of those assets, including evidence of market values of the New Haven securities which might be issued in respect thereof. It then made a finding of the over-all value of the aggregate of the Old Colony's assets for purposes of a system reorganization.

The valuations which Petitioners now cite as examples of the Commission's failures are the tentative valuations assigned to the Old Colony assets in the process above described. That these valuations were tentative is clearly shown by the Commission's statements in its Sixth Supplemental Report (R. 11699-701) where, among other things, the Commission expressly recognized the impossibility of making exact mathematical calculations (R. 11700):

> "The value of Old Colony properties and assets should not be determined solely by mathematical calculations since it is essentially a matter of judgment based upon a consideration of intangible as well as tangible elements and a general knowledge of system requirements."

B. The Sixth Supplemental Report is not arbitrary and capricious and adequately states the Commission's reasons for its findings.

In view of the history of these proceedings and the exhaustive record relating to the Old Colony properties, the Commission clearly had before it sufficient information and data with respect to the Old Colony properties. The Commission considered all of the testimony relating to the value of the Old Colony's railroad properties and fully

analyzed the conflicting claims and the evidence of value as to the non-railroad properties.

As this Court has recognized, such an appraisal is not a simple problem. The Old Colony contribution in the form of operating and other properties could not be appraised by mathematical computation. A listing and summation of all of these items at various dollar values would, as this Court said in the *Milwaukee* case, "necessarily have to be based on extensive assumptions of unprovable validity" and any attempt to do it would simply "present an apparent certainty in the formulation of the plan which does not exist in fact". In the *Western Pacific* case this Court decided that no detailed valuation of operating and non-operating property need be made by the Commission in formulating a plan. Notwithstanding this, Petitioners and the dissenting Judge in the Circuit Court of Appeals have chosen to characterize the Commission's Sixth Supplemental Report as arbitrary and capricious, relying on the fact that the net result in the Sixth is the same as in the Fifth Supplemental Report. This argument is of no significance because the Circuit Court of Appeals' reversal after the District Court's first approval of the Plan did not require the Commission to reappraise the Old Colony's properties. That reversal was solely on the ground that the Commission had not made it clear that the figures in question represented its own judgment; it was not due to any holding that the figures in the Commission's Fifth Supplemental Report were the same (excepting approximately $2,000,000 additional principal amount of bonds allocated to Old Colony to reflect 1942 and 1943 actual operating results) as those in the Joint Report. There is no statutory prohibition against the Commission's adopting proposals of parties, provided, in

the exercise of its independent judgment, the Commission considers such proposals reasonable. The Sixth Supplemental Report makes it clear that the Commission in the exercise of its independent judgment found the allotment to the Old Colony to be fair, thereby discharging its duty under Section 77.

Nor was the Sixth Supplemental Report deficient in its statement of reasons for the findings made. This Court has emphasized the intangible factors in the valuation process. It has also had occasion to emphasize the importance of the element of informed judgment in the reorganization process and has pointed out that the Commission's ultimate conclusion is to be taken as its significant finding. In the *Milwaukee* case the Court said (318 U. S. 523, 539):

> "Reasons which underlie the expert opinion which the Commission expresses on a plan of reorganization under §77 need not be marshalled and labelled as findings in order to make intelligible the Commission's conclusion or ultimate finding or to make possible the performance on the part of the courts of the functions delegated to them. Here, as in other situations [citing cases] it is the conclusion or ultimate finding of the Commission together with its reasons and supporting data which are essential. Congress has required no more."

Under the controlling decisions, therefore, it is clear that the courts cannot lawfully require formal specific appraisals of individual items of property. If the Commission's Reports indicate a consideration of all significant items of property and of the evidence or contentions as to the value thereof, as is the case here, its obligation to state its reasons and supporting data has been discharged.

C. The Commission correctly disposed of the problem of accrued interest on the Old Colony's New Haven First & Refunding Bonds.

In determining the securities to be allocated to the Old Colony, the Commission treated as an asset of the Old Colony the $3,600,000 principal amount of First & Refunding Bonds, together with $379,000 of unpaid interest. Petitioners urge, however, that the Commission's analysis of the terms of the merger does not make any separate allocation for the $792,000 of interest which had been paid and which was on deposit in a special account.

The Commission was well aware of this item and treated it, also, as an Old Colony asset. In developing the terms of merger as expressed in the Commission's Third Supplemental Report, the Commission said (R. 9790-1):

> "The Old Colony parties contended that the amount of the prior lien should be adjusted downward to reflect those portions of the full Boston Terminal Company charges which would not be required to be paid by the provisions of section 3 of the joint report, the amount of cash reserved in respect of the $3,600,000 first and refunding bonds owned by the Old Colony as the result of interest payments during this proceeding and the amount of cash which will probably be so reserved during 1942 and 1943 in view of the estimated probable amounts of interest to be paid thereon during those years, and suggested that a fair compromise of all of these items would be a total deduction of $424,000, leaving a balance of the prior lien, as of December 31, 1943, of $10,076,000. The principal debtor parties contended that the net principal amount of the prior lien should be increased by between $2,500,000 and $3,000,000 to cover interest on the prior lien claim, a matter which was reserved by the court for future determination. After considering the different contentions, it was agreed

that the amount of the prior lien to be used in the negotiations would be $10,500,000."

Petitioners refer to parts of the Sixth Supplemental Report to establish their contention that the $792,000 of interest was not taken into consideration by the Commission. But the Sixth Supplemental Report expressly embodies the previous reports of the Commission and, consequently, the discussion of the treatment of this asset given above (R. 11694).

No party has questioned the propriety of crediting to the Old Colony the $792,000 of interest, and under these circumstances a formal determination as to the ownership of this asset is hardly necessary. The situation here is wholly unlike one involving an actual controversy, such as that relating to the "Pieces of Lines East" in the *Milwaukee* case, to which Petitioners refer.

D. The Commission correctly dealt with the value of the Old Colony's claim against the Bankers Trust Company.

Among the assets of Old Colony are two related claims arising out of the disaffirmance of the New Haven's lease of its properties. One is the $47,000,000 breach of lease claim against New Haven and the other is a claim against the Bankers Trust Company of New York, as Trustee of the New Haven First and Refunding Mortgage, originally stated in the principal amount of $13,000,000, which has never been tried out. The claim against Bankers Trust Company is based upon the theory that when it accepted an assignment of the lease of the Old Colony lines as a part of the security for the First & Refunding Mortgage, the Trustee engaged to meet certain of the covenants of this lease. This is a novel application of the law of landlord and tenant and the theory that the assignee of a lease may be liable on

the covenants thereof has never been applied to the trustee of a corporate mortgage accepting an unexpired lease as a part of the security for a mortgage. Should the claim against Bankers Trust Company succeed, Bankers Trust Company would be entitled to look to New Haven for indemnification under the covenants of the mortgage. Should the claim succeed and should the Old Colony recover a part of its damages from the Trust Company the claim against New Haven should be to that extent reduced to avoid a double recovery.

This claim is one of the Old Colony's most doubtful assets. Being based upon a novel application of the law it may be worth the amount claimed and again it may be worth nothing. In considering what credit should be allowed for this asset in the merger, the Commission noted a compromise value of the claim advanced by the Old Colony Railroad at $4,000,000 and an opposing compromise value of the claim put forward by the principal debtor valuing it at not more than $2,500,000. It also noted the contention of the Insurance Group of New Haven creditors that the claim had no value at all. In its test valuations the Commission selected $3,500,000 as permissible valuation for the claim (R. 9791-2).

The Commission recognized that any recovery against Bankers Trust Company must be set off against the $47,000,000 breach of lease claim in endeavoring to reach a value of the two assets. Petitioners claim the Commission incorrectly made this set-off. But this misconstrues the Commission's Sixth Supplemental Report and ignores the previous Supplemental Reports which are incorporated therein by reference. In its discussion of the treatment of this claim in its Third Supplemental Report the Commission shows that it was fully aware of the contention that

only the settlement value, and not the full amount, of the claim against the Bankers Trust Company should be deducted from the $47,000,000 breach of lease claim (Exhibit R. 9792). Also, in the Sixth Supplemental Report (R. 11682, 11696) the discussion of the amount of the deduction is phrased in the conditional. There the Commission was endeavoring to arrive at a tentative valuation of the breach of lease claim, thus reduced, for the purpose of ensuring that the prior lien claim of the New Haven's Trustees was satisfied. Both of the items involved were tentative in amount and the existence of any value for the Bankers Trust Company claim was uncertain. The valuation of these intangibles was but one step towards the over-all valuation of the Old Colony properties which is solely the function of the Commission.

E. The Commission gave adequate consideration to the probable market value of the New Haven securities to be issued under the Plan and acted upon a proper record.

Petitioners' claim (Question 11) that either the Commission failed entirely to make adequate findings as to the value of New Haven reorganization securities, which were taken in satisfaction of the New Haven's prior lien claim or, if the Commission made such findings, they were based on a record so inadequate as not to support them.

It is unnecessary to repeat a description of the Commission's approach in appraising the Old Colony assets and the way in which it made test valuations in order to compare the Old Colony assets and the prior lien claim and assure itself that no injustice was done to the New Haven and Old Colony creditors. It is these test valuations which the Petitioners now attack as insufficient findings. This Court, however, in its *Milwaukee* opinion, has

ruled that no such cash appraisal of property surrendered and of new securities allotted, is necessary (318 U. S. 523, 565):

> "A requirement that dollar values be placed on what each security holder surrenders and on what he receives would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process. * * * It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered."

See also the *Western Pacific* case, 318 U. S. 448, 486.

The test valuations of the new New Haven securities used by the Commission reflect the testimony of Mr. Pierpont V. Davis at the February, 1942 hearings. This witness testified as to a probable seasoned market value of the new New Haven securities and not as to their market value in 1942 as claimed by Petitioners. While the Petitioners were present at these hearings they offered no attack upon his qualifications or on his opinion and offered no contradicting expert testimony. It was only after a period of war earnings had resulted in a boom in the market prices of securities, which has since subsided, that the Petitioners sought to amend the record and put in evidence as to market prices to contradict Mr. Davis. It will be obvious to the Court that evidence of market prices, which fluctuate daily, offers no valid criticism of the evidence of seasoned values used by the Commission in its test valuation. It is a fundamental principle enunciated by this Court in *I. C. C.* v. *Jersey City*, 322 U. S. 503 (1944), that it is for the Commission to determine the adequacy of the record before it with respect to the appraisal of such

matters as those that Petitioners bring into question. The Commission, in its Sixth Supplemental Report, denied Petitioners' belated request that the record on this point be reopened for the presentation of further evidence and by this determination ruled that the record, in its opinion, was adequate to make its findings.

POINT IV.

The procedure followed by the Commission and the District Court gives rise to no question that need be reviewed by this Court.

Petitioners ask this Court to review the procedure followed by the Commission and the District Court, and to determine whether or not that procedure complied with certain of the provisions of subsections (d) and (e) of Section 77.

A. The Commission's procedure with respect to hearings met the requirements of Section 77 and adequately safeguarded Petitioners' interests.

Petitioners contend that the Commission's procedure with respect to hearings was improper on two occasions, (i) when it did not continue the February, 1942 hearings after the filing of the Joint Report (Question 12), and (ii) when it denied Petitioners' request for further hearings after the District Court's remand of the Old Colony provisions pursuant to the mandate of the Circuit Court of Appeals (Question 13).

(i) After the Plan had been referred back to the Commission by the District Court in December, 1941, the Commission's hearing, upon due notice, extended over a period of three days. Counsel for Petitioners appeared at this

hearing pursuant to leave granted upon their petition to intervene for the purpose of presenting evidence, cross-examining witnesses and participating in the proceedings generally. After all the evidence was presented, and Petitioners, electing to rely upon the record theretofore made, had presented none (R. 9,797), it was ruled that the record would be kept open for the sole purpose of receiving a proposal by the Court Committee as to the securities issuable with respect to the Old Colony properties—no specific proposal in this regard having been offered by any party during the course of the hearing. During the colloquy preceding this ruling the question of further hearings was specifically raised. Director Sweet, of the Commission's Bureau of Finance, who was presiding, recognized the possibility that after receipt of such proposal some party or parties might wish to offer further evidence, and not wishing to foreclose that possibility stated:

> "If anybody is advised at that time [after receipt of the Committee's proposal] that there should be some further hearings in this case, I think that that party would have a right to petition the Commission for a further hearing, if it seemed to be necessary. Whether or not such a petition would be granted depends upon the circumstances at that time." (ICC R. 4330-1)

He also stated:

> "I think fifteen days time would be sufficient after the receipt of the [Committee's] proposals for the parties to determine what they want to do about them. They could file briefs if briefs seemed to be sufficient. If, in the opinion of any of the parties, anything in addition to filing briefs should be necessary, fifteen days would afford ample time for

them to make any representations they care to make to the Commission." (ICC R. 4333-4)

Thus it was left to each party to determine whether the record was adequate for his case after having examined the Committee's proposal. This was a more reasonable course than to compel counsel to reconvene at a formal hearing if none had evidence to present, and counsel for Petitioners made no objection to this ruling. Petitioners now claim that they "desired and assert they had a right" (Brief, p. 44) to an opportunity to submit evidence, to cross-examine witnesses and to argue orally with respect to the Committee's proposal, but despite Director Sweet's invitation they made no request for a further hearing.

Subsection (e) of Section 77 provides that if the District Court shall not approve the plan he may refer the proceeding back to the Commission for "further action" and that the Commission thereupon shall proceed "to a reconsideration of the proceedings" under the provisions of subsection (d). Since Petitioners neither objected to Director Sweet's ruling nor petitioned for further hearing their position must be that the reference in subsection (e) to subsection (d) means that any departure from the procedure prescribed by subsection (d) constitutes a defect voiding the whole procedure. Such is not the case. The direction in subsection (e) that the Commission shall proceed to a "reconsideration of the proceedings" is not a requirement that each step specified in subsection (d) be retraced. The nature of the "further action" to be taken by the Commission rests in the sound discretion of the Commission to be exercised in the light of the reasons for the District Court's failure to approve the plan. *In re Chicago, M., St. P. & P. R. R. Co.*, 145 F. (2d) 299, *cert. den.* 324 U. S. 857. The only question open to the Petitioners in

this regard is whether the course followed by the Commission in this case adequately safeguarded their interests. The answer to this question has been supplied by Petitioners' own actions in registering no objection to the Commission's ruling at the hearing and in failing to avail themselves of the invitation extended by the Commission to petition for further hearings if they had additional evidence to offer.

Furthermore, Petitioners' entire case on this point depends upon their contention that the Committee's proposal constituted a comprehensive plan of reorganization for the Old Colony, following the filing of which a hearing was necessary under subsection (d). For the reasons stated under Point I, we believe the Circuit Court of Appeals was correct in holding that there is but one Plan for a system reorganization.

Petitioners' contention that the Commission's procedure following the February, 1942 hearings was not in accordance with Section 77 is, in the light of the foregoing, hardly a basis for review by this Court.

(ii) The second occasion upon which Petitioners claim the Commission failed to comply with the requirements of subsections (d) and (e) arose after the District Court had remanded the Plan to the Commission in accordance with the mandate of the Circuit Court of Appeals. In arguing that the "further action" and "reconsideration" required of the Commission by subsection (e) upon this remand included further hearings, Petitioners seek to distinguish the instant case from the holding of the Circuit Court of Appeals for the Seventh Circuit on the second appeal in the *Milwaukee* case (*In re Chicago, Milwaukee, St. Paul & P. R. Co.*, 145 F. (2d) 299, *cert. den.* 324 U. S. 857). They state that a distinction arises because in that *Milwaukee*

case the Commission did hold hearings with respect to the remanded particulars of the Plan. In that case this Court had held that a controverted question of lien must be settled and that the Commission must determine what compensation should be given to senior creditors in order to justify participation in the Plan by junior creditors. Since it appeared from the record that neither of those questions had received any consideration initially by the Commission, the necessity for enlargement of the record in that case is apparent. In the instant case the Circuit Court of Appeals did not find that the Plan was defective or that the record was inadequate. Its reversal of the District Court's order was based solely upon expressions appearing on the face of the Commission's Report. By its opinion, which Petitioners now seek to have this Court review, the Circuit Court of Appeals has held that its earlier reversal required nothing more than that the Commission should make additional findings.

The Commission, in considering the matters specified in Petitioners' request for a further hearing and in refusing to grant such petition, gave consideration to the record theretofore made before it and decided that such record was adequate for the purpose of making the necessary findings. This action by the Commission was in accordance with the principle enunciated by this Court in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 514-15 (1944) that an administrative body must judge for itself the adequacy of its record.

The procedure followed by the Commission clearly falls within this Court's definition of proper administrative procedures in *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, 373-4 (1939) as follows:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the

> merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. * * *
>
> "If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard."

Petitioners' reference to the provisions of the National Labor Relations Act does not explain away the force of the foregoing statement by this Court, since that statement relates to general appellate practice apart both from administrative procedure and the National Labor Relations Act.

Furthermore, subsection (d) requires hearings only after the filing of a plan, an action which was not necessary and was not taken after the proceedings were referred back to the Commission by the District Court. Thus, the condition precedent to the statutory requirement of hearings did not occur.

B. The procedure of the Commission and the District Court with respect to voting and confirmation met the requirements of Section 77.

Petitioners contend that the Old Colony bondholders' rejection of the Plan approved by the Commission in its Fifth Supplemental Report and Order was reasonably justified (Question 14), that Section 77(e) required the Plan reapproved by the Commission in its Sixth Supplemental Report and Order to be submitted for the vote of the Old Colony bondholders (Question 15), and that the District Court had no power to confirm the Plan because a voting majority of the Old Colony bondholders had rejected it (Question 16).

As previously stated, after the District Court approved the Plan as contained in the Commission's Fifth Supplemental Report and Order of March, 1944, the Commission submitted it to creditors entitled to vote for acceptance or rejection. In December, 1944 the Commission certified to the District Court the result of such voting, its certificate showing that the Plan had been accepted by all classes of creditors voting except the Housatonic bondholders and the Old Colony bondholders (R. 11,511). In January, 1945 the Circuit Court of Appeals reversed the District Court's order approving the Plan in so far as Old Colony was concerned, holding that it was not clear the Commission had exercised its independent judgment with respect to Old Colony but recognizing that the Commission might still adhere to the same terms (R. 11,540). Then followed the District Court's reference back to the Commission (R. 11,582), the issuance of the Commission's Sixth Supplemental Report and Order reapproving the Plan without change (R. 11,682), the entry of the District Court's Order No. 821 (R. 11,922) enlarging the record as stated in the order and reinstating the Court's earlier order (No. 734) which had approved the Plan as contained in the Commission's Fifth Supplemental Order, and the entry of the District Court's Order No. 822 (R. 11,924) confirming the Plan so approved. The District Court included in Order No. 822 its finding—

> "that said plan is predicated upon findings by the Commission which are supported by material evidence and are in accordance with legal standards and on the basis of said findings that said plan makes adequate provision for fair and equitable treatment for the claims of the creditors in said Classes 1 [Housatonic bondholders] and 10 [Old Colony bondholders], and that the rejection by such Classes is not reasonably justified in the light of the respective rights and interests of the rejecting creditors in said

Classes and all the relevant facts herein" (Par. 11, R. 11,929).

Of the Old Colony parties, only those Old Colony bondholders represented by Petitioners appealed to the Circuit Court of Appeals, which affirmed the action of the District Court (R. 12,655).

(i) Petitioners now ask this Court to review the question whether the rejection of the Plan in 1944 by the Old Colony bondholders was not reasonably justified, in view of the decision of the Circuit Court of Appeals in January, 1945 (Question 14).

The District Court found that the rejection of the Plan by the Old Colony bondholders was not reasonably justified for valid reasons that Petitioners fail even to mention. Such a finding, the Court held, was required by consideration of the effect its failure to confirm and consummate would have upon the Old Colony bondholders. Dismissal of the proceedings as to Old Colony would probably result in an equity receivership, but the Court noted that under such circumstances it would have no power to place limitations upon Old Colony's obligations to furnish passenger service and its obligations with respect to the Boston Terminal, as the Plan provides. This would make the Old Colony less valuable. If the proceedings as to the Old Colony should not be dismissed, the only alternative seen by the District Court would be a further reference back to the Commission. The Court concluded that all that would be achieved by such action would be further delay, since there was nothing in the evidence to warrant a change in the considered judgment of the Commission as to the value of the Old Colony for reorganization purposes. In this connection the Court noted that further delay in the

reorganization would simply increase the New Haven's prior lien claim as the result of the continuing Old Colony deficits, and that this would result in a valuation of the Old Colony properties less favorable to the Old Colony bondholders. For these reasons, among others, the Court held that the Old Colony bondholders were not reasonably justified in rejecting the Plan (Stip. R. I., No. 11, pp. 11, 911-13).

The preponderance of dissent by the Old Colony bondholders was by a narrow margin hardly weighting the scale against the informed judgment of the District Court, who had lived with the case for more than a decade. As this Court held in the *Denver case* (90 L. ed. 1134), Section 77 leaves the fairness and equity of the treatment afforded each class to be finally and objectively determined by the tribunals appointed by law, namely, the Commission and the District Court. The governing standard is whether the treatment accorded the rejecting class is in the judgment of an impartial arbiter in accordance with the principles of fairness which law and justice require and is reasonably fair and justified in the light of the interests of those rejecting it.

(ii) Petitioner's contention (Question 15) that subsection (e) required a re-submission of the Plan to the Old Colony bondholders after the issuance of the Commission's Sixth Supplemental Report and Order is academic. The result of such a re-submission could only have been the same as that actually reached under the procedure followed by the District Court, since if the Plan had been re-submitted the Old Colony bondholders presumably would have again rejected it. The Circuit Court of Appeals' decision reversing the District Court's initial approval of the Plan with respect to the Old Colony at most might have increased the

size of the rejecting majority. However, if the vote falls short of the statutory requirement, it is legally immaterial whether the deficiency is large or small. In either event, the unfavorable vote brings into operation the statutory power of confirmation over the rejection if the applicable tests are met. The Plan approved by the Commission's Sixth Supplemental Report and Order was exactly the same as the Plan approved by the Commission's Fifth Supplemental Report and Order, and that Plan was submitted to the Old Colony bondholders. Nothing would have been gained, and additional delay would have been created by the procedure advocated by Petitioners. As this Court said in *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939) the judicial process in bankruptcy proceedings under Section 77 is "brigaded with the administrative process of the Commission". The procedure adopted, even if technically improper, is clearly within the scope of the doctrine of *injuria absque damno* and does not give rise to any question which need be decided by this Court.

(iii) Petitioners' contention that the "cram-down" provision of subsection (e) cannot be applied to the Old Colony bondholders because they are "the only class of creditors affected by the Plan and have rejected it," is based solely upon the contention appearing throughout their petition that there is a separate and distinct plan for the Old Colony. This argument has been fully dealt with under Points I and II above.

Conclusion.

The petition should be denied.

Respectfully submitted,

FRED N. OLIVER,
WILLARD P. SCOTT,
110 East 42nd Street, New York, N. Y.

Attorneys for Mutual Savings Bank Group.

M'CREADY SYKES,
45 Wall Street, New York, N. Y.

Attorney for United States Trust Company of New York, Trustee of The Harlem River & Port Chester Mortgage.

H. C. MCCOLLOM,
1 Wall Street, New York, N. Y.

Attorney for Irving Trust Company, Trustee 6% Collateral Trust Indenture.

EDWARD E. WATTS, JR.,
20 Exchange Place, New York, N. Y.

Attorney for City Bank Farmers Trust Company, Trustee, First Mortgage Central New England Railway Company.

GEORGE E. BEERS,
205 Church Street, New Haven, Conn.

EDMUND RUFFIN BECKWITH,
20 Exchange Place, New York, N. Y.

Attorneys for Protective Committee for Holders of Boston and New York Air Line First Mortgage 4% Bonds.

JOHN W. DAVIS,
EDWIN S. S. SUNDERLAND,
JUDSON C. MCLESTER, JR.,
JOHN E. MASTEN,
15 Broad Street, New York, N. Y.

Attorneys for Insurance Group.

JOHN L. HALL,
JAMES GARFIELD,
30 State Street, Boston, Mass.

Attorneys for The New York, New Haven and Hartford Railroad Company, Debtor.

CHARLES A. COOLIDGE,
50 Federal Street, Boston, Mass.

Attorney for Old Colony Railroad Company Plan Committee.

JESSE E. WAID,
14 Wall Street, New York, N. Y.

Attorney for Bankers Trust Company, Trustee, First and Refunding Mortgage.

WILLIAM P. PALMER,
31 Nassau Street, New York, N. Y.

Attorney for Bank of New York, Trustee New England Railroad Company Mortgage.

May 22, 1947.

Appendix A.

(Provisions of the Plan concerning Old Colony)

FIFTH SUPPLEMENTAL ORDER.[1]

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of February, A. D. 1944.

FINANCE DOCKET No. 10992.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY REORGANIZATION.

It appearing, That this Commission, on July 13, 1943, made and filed its fourth supplemental report and entered its supplemental order in this proceeding, approving *a modified plan*[2] for the reorganization of The New York, New Haven and Hartford Railroad Company, principal debtor, Hartford and Connecticut Western Railroad Company, hereinafter called Hartford & Connecticut Western, Old Colony Railroad Company, hereinafter called Old Colony, and Providence, Warren and Bristol Railroad Company, hereinafter called Providence, Warren & Bristol, secondary debtors;

It further appearing, That on December 21, 1943, the court having jurisdiction of this proceeding rendered an opinion construing *the plan* and indicating that certain corrections should be made therein, all of which the court stated would be incorporated in the decree to be entered thereafter approving *the plan;* and that the court further indicated in its opinion that should this Commission, on its own motion, file a supplemental report and order adopted to confirm the court's constructions and corrections, such supplemental report and order would be reflected in the court's decree;

It further appearing, That, upon consideration of the court's opinion and further consideration of the record, this

---

[1] *Note:* Stip. R. I, No. 1.

[2] *Note:* All italics added, except in case of introductory, formal phrases.

Commission, upon the date hereof, made and filed its supplemental report containing its findings of fact and conclusions thereon, which report (together with the previous reports of March 22, 1940, February 18 and March 25, 1941, October 6, 1942, and July 13, 1943, in this proceeding approving *a plan*) is hereby referred to and made a part hereof, in which report of even date herewith the said Commission has approved certain corrections and constructions of *the plan* upon its own motion.

It is ordered, That *the following corrected plan of reorganization* of the principal debtor, the Hartford & Connecticut Western, the Old Colony, and the Providence, Warren & Bristol be, and it is hereby, approved.

* * * * * *

B. Except as otherwise provided herein, all property of the principal debtor shall be retained by it or conveyed to a new company, as may be determined by the reorganization committee. As hereinafter used, the term "reorganized company" means the principal debtor as reorganized or the new company thus acquiring the principal debtor's property. All properties, assets, and franchises of the Hartford & Connecticut Western, the Providence, Warren & Bristol, and the Old Colony shall be conveyed and transferred to the reorganized principal debtor, except as hereinafter provided.

* * * * * *

N. The reorganized company shall acquire *as a part of its reorganization* all of the properties, franchises, and assets of the Old Colony except those of the Old Colony's Boston group (those covered in Finance Docket No. 12614) upon the terms and conditions as follows:

(1) (*a*) The charter of the reoganized company and of Old Colony shall be amended, and the franchises and statu-

tory obligations of the reorganized company and of Old Colony (including any charter, franchises, and statutory obligations acquired by the reorganized company in connection with the acquisition of the properties, assets, and franchises of any other railroad, and as operator of the Boston group) shall be amended or superseded so that (1) the reorganized company and Old Colony will be relieved of any obligation to continue to use the property of the Boston Terminal Company, and of any obligation to make any payments for such use if and when such use shall be discontinued; (2) the obligation of the reorganized company and Old Colony and their trustees to make payments on account of interest and principal (at maturity or otherwise, including any deficiency on foreclosure or any other claim with respect thereto) of the debt of the Boston Terminal Company represented by its at present outstanding bonds (or any extensions, renewals or refunding thereof) after the date on which the trustees have made the last payments on account of interest on said bonds, shall, so long as the reorganized company (for itself or as operator of the Boston group) shall use the property of the Boston Terminal Company, be satisfied by payment by the reorganized company of an amount per annum (and at that rate for any period of less than a year) obtained by applying to $275,000 the percentage of the total use of such property from time to time by the principal debtor (including in such percentage prior to the consummation of the plan use by its trustees for itself and as operators of Old Colony and thereafter use by itself and as operator of the Boston group); and (3) the obligation to pay operating expenses shall be limited to the amount of such expenses after deducting all revenues from rentals and concessions; provided, however, that, if the number of passengers using the South Station of the Boston Terminal Company shall substantially increase in the future, this Commission will consider an application by any bondholder of the Terminal Company to make an equitable revision of the amount payable by the reorganized company.

(*b*) The trustee in bankruptcy of the Boston Terminal Company or any receiver in equity which may hereafter be appointed by any court of competent jurisdiction to manage the property and affairs of such corporation shall have the right to elect whether he will exclude the using bankrupt railroads from further occupation and use of the property of the Boston Terminal Company and file a proof of claim for damages in these proceedings, or will accept the terms proposed in the plan for the continued occupation and use of such property by such railroads and thereby waive all claim of damages arising from the rejection and all claims for compensation for the use of its property other than such compensation as is provided by the plan, such election to be exercised upon the submission to him by this Commission of the plan for acceptance or rejection under section 77 (e) of the Bankruptcy Act and within such time thereafter as this Commission in its order of submission shall fix; provided, however, that if such trustee or any successor-receiver shall not exercise his election by rejecting the plan within the time thus limited, and shall not file a claim for damages herein within the 2 weeks next succeeding, then such trustee, his successor-receiver, the Boston Terminal Company and its creditors and stockholders shall, each and every one of them, be barred from participating as a creditor or creditors in these proceedings, or from prosecuting any claim for damages against the estate of the using bankrupt railroads.

(*c*) In the event that on an appeal from an order of the court approving this plan, any features of the plan relating to the obligations of the principal debtor and of the Old Colony to the Boston Terminal Company shall be held to be illegal (to have been inappropriate for judicial approval), if not inconsistent with the directions of the appellate mandate the court may thereupon delete from this order (*a*) all provisions designed to modify or affect the obligations of the principal debtor to the Boston Terminal Company, or

any provisions inconsistent with the appellate opinion, and (*b*) all provisions relating to the acquisition by the principal debtor of the property and assets of the Old Colony or of the Boston & Providence, or both of them, whereupon this order as thus modified may be deemed to state a separate plan for the reorganization of the principal debtor together with the Hartford & Connecticut Western and the Providence, Warren & Bristol, or, if its provisions for the acquisition of the property and assets of the Old Colony and the Boston & Providence shall not have been deleted, as a comprehensive plan to include the acquisition of such properties upon the terms of the order thus modified.

(2) (*a*) The charter of the reorganized company and of Old Colony shall be amended, and the franchises and statutory obligations of the reorganized company and of Old Colony shall be amended or superseded so that neither road will be under any obligation to operate passenger service on Old Colony lines. The reorganized company shall, however, undertake a contractual obligation to operate, for its own account and sole benefit, freight service on the Boston group until such time as it shall acquire the assets and franchises of that group. It shall further undertake a contractual obligation to operate for its own account passenger service on Old Colony lines if and so long as the losses therefrom do not exceed the critical figures provided below. These agreements shall take the form of a stipulation by the reorganized company before the court. The contractual obligation to operate passenger service shall terminate if legislation described below in (*c*) has not been passed prior to the end of 2 years after consummation of the plan.

(*b*) The reorganized company shall not be obligated to acquire the assets and franchises of Old Colony's Boston group along with the Old Colony's other assets upon the consummation of the plan, but shall have the right without

the payment of further consideration on its part to acquire such assets and franchises at, or at any time after, the consummation of the plan. Until such acquisition, the assets and franchises of the Boston group shall remain in Old Colony, the stock of Old Colony shall be reduced to equal in par value the net salvage value ($2,328,895) of the assets in the Boston group, and the reduced stock shall be held by one or more trustees appointed by the court for the benefit of the holders of Old Colony's bonds (including its banks) at the date of the consummation of the plan. At any time, such trustee or trustees shall, upon demand of the reorganized company, convey to it the assets and franchises of the Boston group or, at the option of the reorganized principal debtor, the reduced Old Colony stock held by them.

(*c*) The foregoing parts (*a*) and (*b*) are subject to the proviso that if the Legislature of Massachusetts shall amend the charter of the reorganized company so that it will be under no charter obligation to operate passenger service on Old Colony lines, and provide that such service shall be operated only by virtue of, and in accordance with, the agreement referred to in (*a*) above, or shall by legislation provide equivalent protection (such as that resulting from the formation of a transportation district to take over the passenger service on the Boston group), then, upon consummation of the plan, if such legislation be passed prior thereto, or upon the passage of such legislation within 2 years after the consummation of the plan, the Boston group shall be acquired by the reorganized company.

(3) (*a*) Passenger service on Old Colony's lines may be discontinued if during any of the periods described below passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect. The critical figure for the initial critical period which shall comprise the 2 years following the consummation date or January 1, 1946, whichever shall be the later, shall be $850,000 for any 12 con-

secutive calendar months falling wholly within said initial critical period. The critical figure for any 24 consecutive calendar months, all of which shall be subsequent to the initial critical period, shall be $500,000. In the event that passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect, and if as a result thereof the reorganized principal debtor or the Old Colony shall elect to discontinue passenger service on Old Colony's lines, the Commonwealth of Massachusetts shall have the option of purchasing that portion of the Boston group lines extending from Boston to Braintree at the salvage value thereof which has been accepted for the purposes of the plan (the proportion of $2,328,895, the salvage value of the entire Boston group lines estimated in 1939, applicable to the Braintree branch), plus the depreciated amount of capital improvements made since the date of the appraisal, said option, however, to be limited to such facilities appurtenant to said Boston-Braintree segment as shall reasonably be required by the Commonwealth of Massachusetts for its passenger operation and subject to a right in the reorganized company or in the Old Colony, as the case may be, to make joint use of such of said facilities as are not reasonably required for the exclusive use of the Commonwealth of Massachusetts; provided, however, that such option shall be valid only for a period of 10 years after the consummation of the plan; and provided further that in the event the Commonwealth of Massachusetts shall exercise the option provided herein, the reorganized principal debtor and the Old Colony shall so far as possible accord to the Commonwealth the right to use the Boston Terminal Company property on the same terms and conditions as possessed by the reorganized principal debtor and the Old Colony. Full jurisdiction shall be reserved to the court to determine at the appropriate time, if future controversies should arise, what facilities are in fact reasonably needed for such passenger operation by the Commonwealth and the salvage value thereof as established by the method indicated in the

subsection of the plan, and to enter any and all appropriate orders in the premises.

(*b*) As a basis for determining whether or not the critical figure in effect at the time is being met, the reorganized company shall keep monthly figures of the amount of passenger loss on Old Colony lines. Those figures shall be based upon the application of the segregation formula as approved by this Commission and the court in this proceeding, and the further apportionment of Old Colony's revenues and expenses between passenger and freight service under the general principles of this Commission's prescribed rules for separating common revenues and expenses between passenger and freight service, modified where necessary to be consistent with the apportionments made in the segregation formula and in the light of data reasonably available for such separation. The formula for this computation is annexed hereto as exhibit A.[1] The result of such computation shall determine whether or not the critical figure has been met, unless the Department of Public Utilities of Massachusetts shall deem the Commonwealth or the public aggrieved by a proposed discontinuance of passenger service on Old Colony lines pursuant to the authority contained in the plan and claim that the computations of the reorganized company are inaccurate; in which case it may apply to the District Court for the District of Connecticut for the appointment of a master to audit such computations. The result of such audit shall in all respects be given the same effect as the report of a special master. In such case, whether or not the critical figure has been met shall be determined by the computations as the same may be modified in such proceedings.

(*c*) In the event that on appeal from an order of court approving this plan, any feature of section N (2), (*a*) to (*c*), inclusive, or of section N (3), (*a*) and (*b*) shall be held to

[1] *Note:* Not reprinted as part of this Appendix.

be illegal or inappropriate for judicial approval, if not inconsistent with the appellate mandate, the court may thereupon delete from this order (*a*) the feature or features thus disapproved and (*b*) all provisions relating to the acquisition by the principal debtor of the property and assets of the Old Colony, whereupon this order as thus modified may be deemed to state a separate plan for the reorganization of the principal debtor together with the Hartford & Connecticut Western and the Providence, Warren & Bristol or, if its provisions for the acquisition of the Old Colony shall not have been so deleted, as a more comprehensive plan to include the acquisition of the Old Colony as well, upon the terms of the order thus modified.

(4) In consideration of the transfer and conveyance to the reorganized principal debtor of (*a*) all assets, properties, and franchises of Old Colony other than those of its Boston group and (*b*) the rights set forth above relating to the Boston group, the reorganized company shall issue and deliver to Old Colony's bond holders (including its banks as holders of the bonds pledged to secure their notes) pro rata, at the same time as reorganization securities are distributed to the principal debtor's creditors, in full satisfaction of their rights with respect to such bonds and notes: $4,063,784 of new first and refunding bonds, series A, and $3,047,838 of new income bonds, series A; and the reorganized company shall also issue $857,143 of additional new first and refunding bonds, series A, and $642,857 of additional new income bonds, series A, of which the reorganized company shall deliver as aforesaid so much in principal amount, in the ratio of 32,896 of fixed interest bonds to 24,672 of income bonds, as the actual credit to Old Colony for the year 1943 shall exceed $346,000:[1] and the reorganized

[1] *Note:* Paragraphs D, F, H and I of the Order provide for the necessary adjustments in the amounts of new securities to be issued in the event the Old Colony is not reorganized "*as a part of the plan* approved herein".

company shall also (subject to the limitation provided herein concerning the Boston Terminal Company) assume and pay (*a*) the reorganization expenses of Old Colony as allowed by the court within the maximum limits fixed by this Commission, (*b*) current liabilities of Old Colony incurred in the ordinary conduct of its business prior to the institution of its reorganization proceeding which are entitled to priority over the Old Colony's secured obligations, (*c*) current liabilities and obligations of Old Colony trustees incurred during the reorganization proceeding, (*d*) any and all taxes due to the United States, the Commonwealth of Massachusetts, and/or any city, town, or other political subdivision thereof, from the Old Colony or its trustees for any taxable period prior to the date of confirmation of the plan of reorganization, without requiring proof thereof in the reorganization proceeding and without prejudice by reason of not having been approved in such proceeding, subject, however, to the statutes of limitations normally applicable to the assessment and collection of such taxes, and provided further, that the liability of the Old Colony for any taxes which are the subject of litigation on the date of the confirmation of the plan of reorganization, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable statutes of limitations, shall be determined pursuant to law, and provided further, that this provision shall not be deemed to preclude either the reorganized company, the Old Colony, or its trustees, from contesting the merits of any such tax in the manner provided by law, and provided further, that with respect to taxes the funds for the payment of which are withheld by the principal debtor's trustees, payment by the reorganized company shall be limited to such portion of the total amount thereof as shall be agreed upon with the proper taxing authorities; provided, however, that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property; and (*e*) the reorganized company shall assume and discharge

any and all other claims against the Old Colony which, as of the date of confirmation of the plan of reorganization, have been allowed by the court, excluding, however, any claims ranking junior to Old Colony's bonds.

(5) All claims against the Old Colony or its trustees held by the principal debtor or its trustees, and all claims against the principal debtor or its trustee or the Bankers Trust Company held by the Old Colony or its trustees shall be released, discharged, and canceled.

(6) Whenever any dividend or distribution is declared on the common stock of the reorganized company, (additional) funds in an amount hereinafter specified shall be set aside in a sinking fund and used for the purchase or redemption and retirement of the reorganized company's income bonds issued under the plan, and, in case all of such income bonds shall have been retired, to the purchase or redemption and retirement of its preferred stock issued under the plan. The funds to be set aside in the sinking fund shall be equal to (1) the aggregate amount of the dividend or distribution declared on the common stock, times (2) the ratio of (*a*) the amount of the lease claim of the Old Colony as finally allowed by the court (including any interest allowed) to (*b*) the aggregate amount of the allowed claims (including any allowed interest) of all other unsecured creditors exclusive of the Boston & Providence.

In the event that, as conditionally authorized elsewhere in the plan, the principal debtor is separately reorganized without provision for the reorganization of the Old Colony, and in the event the trustees of the Old Colony are successful in their suit against the Bankers Trust Company, trustee under the first and refunding mortgage of the principal debtor, arising out of the rejection of the Old Colony lease by the trustees of the principal debtor and in the event the Bankers Trust Company successfully asserts a lien for indemnity against the property subject to the first and re-

funding mortgage, the plan shall be modified so as to provide that the reorganization committee shall reserve a sufficient amount of the reorganization securities distributable to the holders of bonds secured by the first and refunding mortgage and creditors junior thereto as security for the discharge of any balance of the lien recovered by the principal debtor's trustees on account of their administrative claim against the Old Colony's estate as may be properly applicable thereto, and such amount of available cash, which, in the judgment of the reorganization committee, may appropriately be applied for this purpose without impairing or disturbing other provisions of the plan, and the cash position of the reorganized company. To the extent that the reorganization securities distributable to the holders of bonds secured by the first and refunding mortgage shall be required to satisfy this lien, appropriate adjustment, under the supervision of the court, shall be made by a redistribution of the remaining securities at the expense of creditors junior to such holders.

* * * * * *

It is further ordered, that, should the judge determine, after due notice and hearing, that the provisions of this plan in respect to the reorganization of the Old Colony are, because of opposition of other than New Haven parties or interests, such as to delay unreasonably and unnecessarily the reorganization of the principal debtor, he may, in his discretion, set such provisions aside and consider and act upon the plan for reorganization of the principal debtor and the secondary debtors other than the Old Colony.

* * * * * *